No. 14,766

In the United States
Circuit Court of Appeals
For the Ninth Circuit

MARTHA M. KIRK, an adult, and
KENNETH WILLIAM KIRK, a minor, who sues by his Guardian ad Litem, Martha M. Kirk,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S PETITION FOR REHEARING
AND
BRIEF IN SUPPORT OF PETITION FOR REHEARING

SHERMAN F. FUREY, JR.
United States Attorney
District of Idaho

JOHN T. HAWLEY,
Assistant U. S. Attorney
District of Idaho
Attorneys for Appellee.

FILED

Filed..... ,1956
MAY 21 1956

....., Clerk
PAUL P. O'BRIEN, CLERK

No. 14,766

In the United States
Circuit Court of Appeals
For the Ninth Circuit

MARTHA M. KIRK, an adult, and
KENNETH WILLIAM KIRK, a minor, who sues by his Guardian ad Litem, Martha M. Kirk,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S PETITION FOR REHEARING
AND
BRIEF IN SUPPORT OF PETITION FOR REHEARING

INDEX

Page

Petition for Rehearing 3

Certificate of Counsel 6

Brief in Support of Petition for Rehearing 7

Conclusion 29

CITATIONS

CASES: Page

Bell v. *Morgan, et al.*, 199 F. 2d 168 (1952) 21

Black, In re, 58 Idaho, 803, 80 P. 2d 24 15

Brown v. *Arrington*, 74 Idaho 338, 262 P. 2d 789.10

Gifford v. *Nottingham*, 68 Idaho 330, 193 P. 2d 1054 12

Indian Towing Co. v. *U. S.*, 350 U. S. 61 29

Jones v. *Packer John Mines Corp.*, 60 Idaho 653, 95 P. 2d 572 18

Larson, M. E. et al., v. *Ind. School Dist. No.* 11*J*, King Hill, et al., 53 Idaho 49, 22 P. 2d 299..18

Laub v. *Meyer, Inc.*, 70 Idaho 224 13

Lichton v. *Eastern Airlines*, 87 F. Supp. 691, aff. 189 F. 2d 939 25

McGee v. *Koontz*, 70 Idaho 507, 223 P. 2d 686 12, 14

Moon v. *Ervin*, 64 Idaho 464, 133 P. 2d 933.....12

O'Niel v. *Madison Lumber and Mill Company*, 61 Idaho 546, 105 P. 2d 194 15

Pinson v. *Minidoka Highway District*, 61 Idaho 731, 106 P. 2d 1020 14

Reynolds v. *Maples*, 214 F. 2d 395 25

Rushford v. *United States*, 204 F. 2d 831 19

CITATIONS

CASES: Page

Smart v. *U. S.*, 111 F. Supp. 907, aff. 207 F. 2d, 841 25

Theobald Industries, Inc. v. *U. S.*, 115 F. Supp. 699 25

STATUTES:

Idaho Code, Section 72-103 7

Idaho Code, Section 72-1010 12

USCA

Title 28, Section 2674 7

Title 28, Section 1346 (b) 7

MISCELLANEOUS:

35 Am. Jur. (Master and Servant), Sec. 3, Page 445 13

27 Am. Jur. (Independent Contractors) Sec. 2, page 481 27

27 Am. Jur. (Independent Contractors) Section 27, page 504 27

PETITION FOR REHEARING

TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND THE JUDGES THEREOF:

COMES NOW the United States of America, the appellee in the above entitled cause, and respectfully petitions for a rehearing in the above entitled cause for the following reasons and upon the following grounds:

I

The court erred in ruling that the United States of America was not an "employer" in this case and giving as its reasons the fact that there is no specific provision in the Idaho Workmen's Compensation Act which would define the Government as such. Such ruling is erroneous for the reason that the legislature of the State of Idaho cannot limit or expand the liability of the United States of America under the Federal Tort Claims Act. The Government, as a result thereof, is deprived of the right to have its liability limited to the specific wording of the Federal Tort Claims Act wherein it provides that the liability of the United States shall be that of a private person under like circumstances under the law of the place where the tort occurred.

II

The court erred in holding that the Idaho Workmen's Compensation Act does not furnish a defense to the Government in this action and giving as its reason the fact that the Idaho Code has been continued without change under a 1949 Code Compila-

tion since the enactment of the Federal Tort Claims Act and that no amendments were provided therein defining the United States as an "employer." The court erred because such a ruling deprives the Government of the limitations on its liability set up in the Federal Tort Claims Act, itself, wherein the standard of liability is the liability of a private person under like circumstances and under the law of the state where the tort occurred.

III

The court erred in holding that the Idaho statute should not be extended by construction to abrogate what would otherwise be a plain cause of action against the United States since 'the statute did not expressly so provide or necessarily so imply.' Such a ruling is error for the reason that the standards of liability of the United States of America as set out in the Tort Claims Act cannot be changed, expanded or limited by the Idaho legislature.

IV

The court erred in holding that under the provisions of the Idaho Workmen's Compensation Act and the Idaho Supreme Court decisions interpreting that act, that the Government, if a private party, would not be an employer under the terms of the act for the reasons set forth in our original brief, pages 9 through 18, and for the further reasons that follow these assignments in our brief and argument.

V

The court erred in holding that the trial court's decision denying appellants' right to amend was

"wholly unwarranted and a ruling operating to avoid ascertaining the true facts in the case" for the reason that all of the "true facts" were in the possession of appellants eighty-three days before the court's opinion granting summary judgment was handed down, and for the further reasons that appellants chose to stand upon their pleadings despite the fact that they had all of the information giving rise to their attempted amendments long before the lower court's decision was entered.

VI

The court erred in holding that the case should be sent back for a trial in the face of its ruling that the dam was being built by an independent contractor, for the reason that the general rule is that the employer shall not be liable for the torts of an independent contractor or the latter's servants, and in this case the amended complaint merely alleges acts of omission only as constituting the negligence on the part of the United States of America.

The foregoing assignments will be further exemplified in our brief and argument following.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted, and the judgment of the District Court of the United States for the District of Idaho, South-

ern Division, be, upon further consideration, affirmed.

Respectfully submitted,
SHERMAN F. FUREY, JR.,
United States Attorney
for the District of Idaho
By
JOHN T. HAWLEY,
Assistant U. S. Attorney
for the District of Idaho.

CERTIFICATE OF COUNSEL

I, John T. Hawley, counsel for the above-named appellee, do hereby certify that the foregoing petition for rehearing of this cause is well founded and presented in good faith and is not interposed for delay.

SHERMAN F. FUREY, JR.
United States Attorney
for the District of Idaho

By
JOHN T. HAWLEY,
Assistant U. S. Attorney
for the District of Idaho

IN THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT

MARTHA M. KIRK, an adult, and KENNETH WILLIAM KIRK, a minor who sues by his Guardian ad Litem, Martha M. Kirk,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

In discussing the grounds for our petition for rehearing we will present them in the same order that they are listed in the petition and with corresponding numbers:

I, II and III.

> The court on page 6 of the opinion states:
> "Perhaps the most conclusive reason why the United States is not actually an 'employer' within the meaning of the Idaho act, is that there is no provision therein which would define it as such."

Idaho Code, Section 72-103 is then referred to, which lists the public employment to which the act applies and which does not include the United States of America. The Government, of course, never contended that it was actually an employer under the terms of the Idaho Workmen's Compensation Act. (See our original brief, page 11). Title 28 USCA, Section 2674, provides in part as follows:

> "The United States shall be liable respecting the provisions of this Title relating to tort claims *in the same manner and to the same extent as a private individual under like circumstances,—.*"
> Title 28 USCA, Section 1346 (b) provides in part as follows:
> "—the District Court — shall have exclusive jurisdiction of civil actions on claims against the United States for money damages—for in-

jury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment *under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*"

This holding suggests that because the United States of America as such is not specifically included in the Idaho Workmen's Compensation Act, therefore, the Government is not entitled to any defenses arising under that Act. That reasoning in effect places the Idaho legislature in a position to nullify the provisions of the Federal Tort Claims Act itself wherein the liability of the United States of America is limited to that of a private person under like circumstances and under the law of the State where the tort occurred. We seriously contend that the fact that the State of Idaho has not included the United States of America as such in its Workmen's Compensation Act should have no bearing on the specific limitations of liability set forth in the Tort Claims Act itself. We do not feel that the various states should or would even consider legislating directly to affect the liability of the United States for suits in tort. Such legislation is a matter entirely within the control of the Congress of the United States of America. The United States of America is a sovereign, and as such it must give consent before it can be sued. It has given consent to be sued under the limitations and provisions of the Federal Tort Claims Act. To say, in effect, that be-

cause the United States of America is not specifically covered in the Idaho Workmen's Compensation Act, therefore the United States of America shall be denied the defenses arising under that act, is conceding to the State of Idaho a power over the United States which we doubt it possesses. The court states in its opinion on page 9:

> "What adds to our confidence that nothing contained in the Idaho Workmen's Compensation Act furnishes any defense in this case, is the fact that the act has been continued without change in an authorized code compilation since the enactment of the Tort Claims Act. [9/] It seems improbable that the Idaho legislature could have intended that the Idaho Act should extend immunity to the United States in cases of this character. Paraphrasing the language used by the Idaho Court in Brown v. Arrington, supra, we think that the Idaho statute should not be extended by construction to abrogate what would otherwise be a plain cause of action against the United States since 'the statute does not expressly so provide or necessarily so imply'."

The court holds that because the Idaho Workmen's Compensation Act has not been changed since the enactment of the Tort Claims Act is sound reason to believe that the Idaho legislature never intended to extend immunity to the United States in cases of this character. We feel such a holding is erroneous in that it once again concedes a power to the State of Idaho which we are sure it does not now and never

has had. The reasoning the Idaho Court uses in refusing to extend the Idaho Workmen's Compensation Act by construction to abrogate a common law cause of action against a third party seems hardly applicable to the situation in this case. The "plain cause of action" existing against the United States of America exists because the United States of America has consented to be sued. It is not based upon a common law right as was the cause of action in Brown v. Arrington, 74 Idaho 338, 262 P. 2d 789. We are not quite clear as to how the court feels the application of the clear wording of the Federal Tort Claims Act limiting the liability of the United States of America could be construed to mean the Idaho Workmen's Compensation Act would be extended by construction to abrogate what would otherwise be a plain cause of action against the United States. We do not contend that the Idaho statute should be extended by construction. However, under the Tort Claims Act the United States is entitled to have its liability measured by the clear wording of the act itself. That is, what would the liability be of a private person under like circumstances and under the law of the place where the tort occurred. The tort occurred in Idaho. Therefore, Idaho law should govern. Since Idaho law governs, then we must look to the liability of a private person under these circumstances under Idaho law. We feel certain that it was never seriously considered by the Idaho legislature to include the United States of America in its Workmen's Compensation Act. To hold that the rights and liabilities of the United States of America can be controlled by the action or inaction of the Idaho State legislature seems to us

to be a serious restriction upon the right of the government to have its liability measured by the clear language of the Federal Tort Claims Act. Congress intended that the United States of America could be sued in tort under certain conditions. Those conditions were spelled out in the Federal Tort Claims Act and consent therefore was given for the Government to be sued pursuant to the provisions of that act, not pursuant to the enactments of the legislature of the State of Idaho.

We realize, of course, that the court in its opinion has also applied the yard stick of the liability of a private person under like circumstances and under the law of the State of Idaho and has concluded that under the record in this case the United States of America would not be classified as an employer if it were a private person under Idaho law. However, the fact that the court so seriously considers the holdings specified in Assignments Nos. I, II and III, and since those holdings will undoubtedly have a tremendous effect upon future standards to be used in determining the tort liability of the United States, we feel they should be brought to the attention of the court. We feel that these holdings are erroneous and will produce an effect never contemplated by the Congress of the United States when it originally passed the Federal Tort Claims Act.

IV.

It was the Government's contention that under the facts and circumstances in this case the Government if a private individual would be classed as a statu-

tory employer under the Idaho Workmen's Compensation Act and under the Idaho decisions interpreting that act. The Court finds that the United States could not be said, within the meaning of Idaho Code, Section 72-1010 to be "virtually the proprietor or operator of a business there carried on" and that the Government was not carrying on a business in building the dam. The court holds that it is clear that the United States in this case is occupying a position analogous to that of the physician in Moon v. Ervin, 64 Idaho 464; 133 P.2d 933, and to that of the City in Gifford v. Nottingham, 68 Idaho 330; 193 P.2d 1054, and the court further cites the case of McGee v. Koontz, 70 Idaho 507, 223 P.2d 686.

This contention was made by appellants on page 26 of their Brief wherein they state that the City of Pocatello and the Government occupy similar positions in that "in each instance they exercise general supervision and inspection to determine that the work was being done according to the contract." As we pointed out on page 17 of our original brief, the Nottingham case did not say nor did it even imply that the City of Pocatello "exercised general supervision and inspection to determine that the work was being done according to the contract." As a matter of fact, the City of Pocatello was not even a party to the suit. After noting the court's reliance upon the case of Moon v. Ervin, (supra), in support of its holding that the Government was not the proprietor or operator of some business being carried on on the premises, we once again examined the Moon case. In addition to the statement of the Idaho court on page 469 which reads as follows:

—"If it is sought to hold one as an employer in a situation of this kind, it must be shown that such person was the proprietor or operator of the business there carried on. (Citations)"

The court says on page 469 and 470:

"This section makes an employer who is subject to the provisions of the act, liable for compensation to an employee of a contractor or subcontractor under him, etc. As stated above, respondent Schreiber was not an employer. He had not the power of control of either Ervin or his employees."

From this statement and the other Idaho decisions we concluded in our original brief that the question of control was seriously considered by the Idaho court in determining the employer-employee relationship. However, on page 468 of the Moon opinion, the court states as follows:

"Appellant Moon was employed by Ervin, with others, as a laborer on the construction job, and there is no evidence that he, or the other laborers, received instructions or directions from anyone other than from Ervin, or that any of the respondents in this case had *the right of control over Moon. He was under the sole control of Ervin. The essential element of the relationship of employer and employee is the right of control* (35 Am. Jur., Page 445, Sec. 3)."

In the case of *Laub* v. *Meyer, Inc.*, 70 Idaho 224, cited in our original brief, page 21, the court held

that the respondent was an independent contractor of Meyer, Inc. and that no contractual agreement existed between him and the appellant Montgomery Ward Co. The court states on page 227:

> "The general rule for determining whether one is a general contractor or employee was well stated by this court in Pinson v. Minidoka Highway District, 61 Idaho 731, at page 737, 106 P.2d 1020, 1022: 'The general test is the *right to control and direct the activities of the employee, or the power to control the details of the work to be performed and to determine how it shall be done and whether it shall stop or continue*, that gives rise to the relationship of employer and employee, and where the employee comes under the direction and control of the person to whom his services have been furnished, the latter becomes his temporary employer, and liable for compensation'."

This court cites the Idaho case of McGee v. Koontz, 70 Idaho 507, 223 P. 2d, 686, and we note on page 510 of that opinion that the Idaho court emphasizes control as a key to the determination of the employer-employee relationship.

The Idaho Court then, in determining the employer-employee relationship for the purposes of drawing that relationship into the Workmen's Compensation Act, gives serious consideration to the right of control existing in each case.

The retention by the employer of the *right and the power* to exercise control or supervision, even though

not actually exercised, is the main test of the relation of the employer and employee. See *In re Black*, 58 Idaho, 803, 80 P.2d 24 and *O'Niel* v. *Madison Lumber and Mill Company*, 61 Idaho 546, 105 P. 2d 194.

This court takes note of the fact that the complaint contains allegation of control, dominion, authority and supervision over the work of the deceased. We should like to direct the court's attention to the fact that on pages 3, 4, 5 and 6 of our original brief we not only set out in detail what we consider to be the pertinent portions of the complaint, but also set out the pertinent portions of *all of the other pleadings*. It is true that the Government denied that any officer or employee of the defendant had general management or control over the actual construction of the control tower of Lucky Peak Dam in May, 1953. However, on July 8, 1954, the appellants answered the Government's Interrogatories and Request for Admissions, and in so doing they *denied* that the Government did not have the right to direct, supervise, or control the work of deceased. In other words, at that time the appellants were once again asserting that the right of control of the Government over the activities of the deceased existed, even though they knew the Government denied such an allegation. These answers and admissions reasserting the right to control were filed by appellants eight days *after* they had received the information requested by them from the Government. Therefore, the appellants had the information that the Government was denying that the right to control existed, yet having that information, they insisted in their answers that the right to control did exist. In addition to the Government's Response to Admissions and Answer to the

Interrogatories, we point out that on June 3, 1954, the attorney for the appellants was given a copy of the contract between the Government and the Independent Contractor building Lucky Peak Dam. Once again we point out, this information was given to the appellants *before* they answered the Government's Interrogatories and Request for Admissions. When, therefore, appellants once again maintained that the Government had the right to control the activities of the deceased, they did so with full information concerning all of the facts in this case.

All of this information was given to appellants some two months and 21 days before the Motion for Summary Judgment was granted.

What more information could be given to appellants to apprise them of all of the facts in this case including the Government's position?

On July 12, 1954, the Government moved for a summary judgment based upon the pleadings, admissions, interrogatories and a certified copy of the contract filed in the case. The motion for summary judgment was thoroughly briefed and argued before the court, and the court's opinion was not handed down until September 20, 1954.

The appellants then, despite the fact that they had all of the information concerning the true facts, including the contract and the knowledge that the Government denied that the right to control existed over the activities of the deceased, insisted on maintaining their stand upon their complaint. Never at any time until the day *after* the memorandum

decision of the court was handed down, did they indicate that their statement of the facts and their theory of the case would be changed.

There was no attempt by the Government to hide the facts in this case. Certainly the appellants were well aware of our position. Certainly, they were aware of the contractual relationship existing between the Government and the Bruce Mitchell Construction Company. Yet, they stood on their position as alleged in the complaint. They stood on their allegations that the Government was in control and supervision of the activities of deceased, not because of ignorance of the true facts, but because without an allegation that the Government controlled the activities of deceased it would be extremely difficult to find liability against the United States existing for his death. That, we are sure, is the real reason why appellants did not even attempt to amend their complaint until *after* the court ruled.

Two examples of activities presenting "like circumstances" are given by the court. Both of these, the farmer building a dam and the church operating without gain, happen to fall within the exceptions to the Idaho Workmen's Compensation Act and are exempt from its provisions. The farmer, because he is engaged in agricultural activities, the church because it is operating not for the sake of pecuniary gain. We think such analogies are not accurate. The Government is not engaged in agricultural activities. It was building a dam to provide protection for its citizens and their property. The example of

the church illustrates the court's emphasis on the fact that the Government is not out to make a profit. The Government, we repeat, was building a dam, and in so doing, indirectly, and in some instances directly, benefiting its citizens. The Government will receive a profit from this activity. The Government of the United States of America is composed of its citizens, and many of them will profit from the Lucky Peak project. Furthermore, we feel confident that direct benefits measurable in dollars and cents will be received from this project.

If the United States were a land development company, the benefit from this project would be the development of the land, itself. Idaho law does not require that the "business" engaged in shall result in pecuniary gain. The Idaho Supreme Court, as pointed out in our original brief, pp 12-21, has said that development of property alone may be a proper test of the employer-employee relationship under the Idaho Act. (*Jones* v. *Packer John Mines Corp.*, 60 Idaho 653, 95 P.2d 572. That court has held that benefit need not be actual money. (*M. E. Larson, et al* v. *Ind. School District No.* 11*J*, *King Hill, Idaho, et al*, 53 Idaho 49, 22 P.2d 299). And of course the essential element to consider in determining that relationship is whether or not the right of control exists.

It is hardly within the spirit of the Tort Claims Act to search for "analogous liability" and find it in two activities, agricultural and religious, which are exempt from the provisions of the Idaho Act. We think the court need not have sought such liability in

view of our position wherein we specifically agreed that merely because the United States was engaged in a peculiar activity such fact would not be claimed as a defense in this case.

We strongly urge that the court's opinion is a serious threat to the clearly worded limitation of the liability of the United States defined in the Federal Tort Claims Act. Surely, Congress must have recognized that the United States occupied a unique position in the field of torts when it consented that the Government be sued. Congress must have felt it necessary to include a plainly worded standard of liability based upon the liability of a private person under like circumstances.

We sincerely feel that the court's opinion in this case is a drastic step towards ultimate destruction of this requisite of liability imposed upon all who would sue the Government in tort under the Tort Claims Act.

The opinion actually removes the Government's right to be compared to a private person under like circumstances under the Idaho Workmen's Compensation Act. It removes a segment of Idaho law from application in this case. It seems to us that such reasoning is contrary to that of Judge Learned Hand in *Rushford* v. *United States*, 204 F.2d 831, wherein he states that the proper state law in all respects was to be the model for the liabilities Congress intended to accept.

V

On page 11 of the opinion, the court holds that the decision of the lower court in refusing to allow the amendment of the complaint was "wholly unwarranted and a ruling operating to avoid ascertaining the true facts of the case." On page 8 of the opinion it is stated:

> "Hereafter, we shall allude to the plaintiffs' attempt to amend their complaint so as to make it conform to the facts as defendant asserted them to be."

Such a ruling indicates without question that the lower court abused its discretion by holding the plaintiffs to their original complaint after the Government admitted that the facts were otherwise. We respectfully point out to this court that while it is true that the Government in its answers to interrogatories and in its admissions denied having the right to control the activities of the deceased, that information was given to the appellants eighty-one days before the summary judgment was entered by the court. This information and the certified copy of the contract was given to the appellants long before briefs were submitted to the court on the motion for summary judgment.

Why did the appellants wait until after the memorandum decision of the court had been handed down granting the summary judgment to the Government before they filed their motion for leave to amend the complaint? They were apprised of all of the facts

so they could have amended their complaint before the motion for summary judgment was even filed. They did not choose to do so. They chose to stand on the allegations of their original complaint, and it was so argued and briefed before the lower court.

We should point out to the court the reasons given by that court in denying the motion for leave to amend which motion was briefed and argued thoroughly before the court. The court stated in its opinion dated March 3, 1955 (R. 59):

> "On consideration of the pleadings, admissions, interrogatories and briefs on file herein, it does not appear that it would serve any useful purpose to grant plaintiffs' motion, nor does it appear that granting such leave would be in the interests of justice. Also, the court is not inclined to exercise its discretionary power to grant such leave since, by amending, plaintiffs seek to shift their ground, denying facts, which they earlier alleged and admitted, upon which summary judgment was granted. Plaintiffs now seek to proceed upon a theory which conflicts with that which they pursued up to the granting of said summary judgment. Bell v. Morgan, etal., 199 F.2d 168 (1952)."

Now what was it that the appellants attempted to do by amending their complaint — and once again we must emphatically point out to the court that all of the information and facts upon which the amended complaint is based was given to, and was in the possession of, the appellants long before the motion for

summary judgment was ever argued. They reduced the allegations of control on the part of the Government over the activities of the deceased. It is true, as this court points out, that the amended complaint deleted the allegations of control, dominion and authority, but this court goes further and states:

> "As was also the allegation that the Government employee was 'supervising the work.' "

We must point out to the court that all of the allegations of supervision were *not* deleted by the appellants. We direct the court's attention to the proposed amendments to the complaint which read as follows: (R. 70):

> "That the work upon the Lucky Peak Dam project, being performed by the independent contractor was done under said contract No. DA-45-164-eg-2200, and that *the work thereunder was being conducted under the general direction of the contracting officer thereon, and subject to the inspection of his appointed agents, all of whom were employees of the defendant. That such general supervision and inspection, as set forth in said contract, was for the purpose of determining compliance by the independent contractor by such contract.*"

Appellants flatly contend, therefore, in their amendments to the complaint, that the Government employees had general supervision and inspection rights as spelled out in the contract for the purpose of determining whether or not the independent contractor was complying with the contract. For this

court to hold that the lower court abused its discretion in a "wholly unwarranted" ruling which operated to avoid ascertaining the true facts in the case is erroneous and a serious reflection upon the court below. Furthermore, we feel such ruling is not justified considering the entire record before this court.

Once again we call the court's attention to the fact that the "true facts" of this case were before the appellants and their attorney before the motion for summary judgment was even argued and briefed. All of the information upon which the appellants base their proposed amendments to the complaint was in their possession in the latter part of June 1954. Yet they chose to make a stand on the allegations in their complaint. We can only conclude that this stand was intentional and with the full knowledge of the contents of the documents and pleadings given them. Certainly the Government was not hiding or concealing any facts from appellants at any time during the proceedings in this case. We know that the lower court in refusing to allow the amendment had no intention to, and actually did not, make a ruling which would operate to avoid ascertaining the true facts. We know this because the true facts were in the hands of the appellants in sufficient time for them to make their decision to amend the complaint before the motion for summary judgment was even filed.

An examination of the affidavits supporting the motion for the amendment of the complaint made by T. H. Eberle, attorney for appellants in the above case, which affidavit was sworn to on September 21, 1954, and filed with the motion for leave to amend

the complaint, along with the amendments. The affidavit reads in part as follows:

> "That the complaint filed in the above-entitled cause was prepared without access to the files and records of the Government, and in particular, the contract between the Government and the construction company,—and further interrogatories and admissions filed and answered by the defendant and plaintiff in this cause, set forth facts unknown to plaintiff at the time this action was filed."

Appellants filed the action against the Government on February 23, 1954. Possibly they were not in possession of all of the facts as set forth in the affidavit at the time the complaint was filed. However, by the 30th day of June, 1954, they were in possession of all of the facts as disclosed by the appellee's answers to admissions and response to interrogatories and as disclosed by the certified copy of the contract itself.

The appellants have come into court on their complaint and having been apprised of all of the facts which ultimately gave rise to their attempted amendment of the complaint, they made their decision to stand on the complaint and on that basis resisted the motion for summary judgment. The holding of this court in effect binds the Government strictly to its response to admissions and answers to interrogatories and brushes aside the allegations of control and supervision set forth in the complaint, apparently as not being binding upon the plaintiffs even though the general rule seems to be that the allega-

tions of the complaint for the purposes of the motion for summary judgment, if well pleaded must be taken as being true. *Reynolds* v. *Maples*, 214 F. 2d, 395, *Theobald Industries, Inc.* v. *U. S.*, 115 F. Supp. 699, *Smart* v. *U S.*, 111 F. Supp. 907, affirmed 207 F. 2d, 841.

In the case of *Lichton* v. *Eastern Airlines*, 87 F. Supp. 691, E. D. N. Y., 1949, which case was affirmed in 189 F. 2d, 939, it was held that where the defendant moved for summary judgment and the plaintiff made a cross-motion for summary judgment, the defendant admitted the facts alleged in plaintiff's complaint for the purposes of defendant's motion, but did not admit such allegations for the purposes of plaintiff's motion.

In this case the Government has been put in the peculiar position of having been sued on one theory and having obtained a summary judgment against the plaintiffs on that theory. Then the plaintiffs, despite the fact that they made a firm stand in favor of their complaint up until the court rendered its opinion on the summary judgment, turn around and attempt to amend their complaint. They deny the facts set forth in their complaint, shift the grounds for their complaint, and say, in effect, to the court: despite the fact that we were possessed of all of the information giving rise to these amendments *before you ruled on the motion for summary judgment*, and despite the fact that we made our stand on that motion, we now come into this court to say that our complaint was all wrong because we didn't have sufficient facts and therefore we wish to deny facts

that we have previously admitted and change the theory of our case.

We submit that there was neither error nor abuse of discretion in the trial court's denial of the leave to file the amendments to the complaint for the reasons that the trial court itself sets forth in its order dated March 3, 1955, (R. 59).

The court by its decision has limited drastically the value of Rule 56 and the summary judgment proceeding thereunder. If it is an abuse of discretion to refuse to allow an amendment to the complaint after the court has rendered its decision on the motion for summary judgment in a case where the plaintiff has had all necessary information for the amendment for almost three months, then it would be hard to find a case in which the refusal to allow the amendment would not be an abuse of discretion.

If the plaintiff can oppose the motion and stand on his complaint until after the decision and then completely shift his ground and amend his complaint as a matter of right,—of what use is the summary judgment proceedings?

VI

If the court should affirm its decision as to all the other points raised herein, we then come to another question. On page 4 of the opinion the court states that " . . . the actual work thereon (on the dam) was being done by the independent contractors under contract let to them." If the amended complaint is allowed, then the plaintiff has admitted that the work

was being done under the contract. The interpretation of the contract is a matter of law. Therefore, this ruling would appear to be conclusive on the parties. The court, if it affirms its decision in all other respects, has then found that the complaint as amended does not allege any control in the Government. This would be in accord with its prior finding that the Bruce Mitchell Company was an independent contractor, since the prime prerequisite of the relationship of an independent contractor is the right to control the manner and detail of the work. 27 *AM. Jur.* (*Indpendent Contractors*), Section 2., P. 481.

The appellants by interrogatory were requested to state fully and with particularity the negligent acts and omissions of the employees of the United States which appellants claimed caused the death of Kirk. In answer thereto they did not allege any negligent acts, but did allege negligent *omissions*, all of which related to the manner of the performance of the work by the independent contractor. This work, the court has found, under the allegations of the amended complaint, was under the control and direction of the independent contractor and was not under the control and direction of the employees of the United States. Where there is no right of control, there can be no liability for failure to act.

The general rule is that an employer is not liable for the torts of an independent contractor, or the latter's servants. 27 *Am. Jur.* (*Independent Contractors*), Section 27, P. 504. There are no allegations in the amended complaint that would bring this

case under any of the exceptions to the rule, and there must be the right of control upon which to base a liability for failure to act. Under the court's findings and the negligent omissions as set out by the appellants, there is nothing to be tried, and the Government is entitled to a summary judgment.

If the court sends this matter back for trial under the facts as it has determined them to be, and as admitted by the appellants, it is setting a new precedent. This ruling would open the courts to a flood of litigation. Every employee of an independent contractor who receives any injury as a result of the negligence of the contractor or his employees can allege failure of the employees of the United States to inspect and be entitled to a trial of the action, even though, as found by the court here, the United States had no control over the manner and detail of doing the work.

We submit that if the amended complaint is accepted, appellants have then admitted the work was being done under the contract in the record. Such contract clearly establishes the relationship of an independent contractor who had control over the work being performed. The allegations of negligence when considered in relation to the contract establish that any negligence was the negligence of the independent contractor, and did not relate to any matter over which the employees of the United States

had any right of control. On the basis of the holdings of this Court, there is no reason to remand this case to the District Court for trial, and the decision of the District Court should be affirmed.

CONCLUSION

We seriously contend that this decision will have a far reaching effect upon the tort liability of the United States of America in future cases—an effect never intended by Congress when it enacted the Federal Tort Claims Act and originally granted the consent for suit in tort against the United States.

Justice Reed in his dissent to the majority opinion of the Supreme Court in *Indian Towing Co.* v. *U. S.* 350 U. S. 61, expresses an opinion reflecting our views concerning the effect of the instant decision when he says on page 75:

> "This enactment, like any other, should be construed so as to accomplish its purpose, but not with extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress. It is certainly not necessary that every word in a statute receive the broadest possible interpretation. If Congress intended to create liability for all incidents not therefore actionable against suable public agencies, that intention should be made plain. The courts are not the legislative branch of the Government."

Accordingly, we respectfully urge that appellees petition for rehearing be granted and that the judgment of the District Court for the District of Idaho, Southern Division, be, upon further consideration, affirmed.

Respectfully submitted,

SHERMAN F. FUREY, JR.,
United States Attorney
for the District of Idaho

By

JOHN T. HAWLEY
Assistant U. S. Attorney